

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Art Unit: 3724)
)
Examiner: Clark F. Dexter)
)
Appellant: Michael L. O'Banion, et al.)
)
Serial No.: 09/614,355)
)
Filed: July 12, 2000)
)
For: **Adjustable Fence For Compound Miter Saw**)
)
Atty. Docket: 0275A-000103/COF)

APPEAL BRIEF

Appeal No. _____

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Director of the United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450 on May 14, 2004.

By: _____

Michael J. Schmidt

Director of the United States Patent and Trademark Office
P.O. Box 1450
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Dear Sir:

This is an appeal from the November 18, 2003 Final Rejection of Claims 1, 10, 11, 14, 15 and 22-32 of the above referenced patent application. Claims 2-7 are currently withdrawn from consideration at this time. None of the claims have been allowed. Claims 8, 9, 12, 13 and 16-21 were cancelled during the prosecution of the application.

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Claims 1, 10, 11, 14, 15, 22-25 and 27-32 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Viazanko (U.S. Pat. No. 4,798,113) in view of applicant's admitted prior art (hereafter "APA"). Claim 26 is rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Viazanko (U.S. Pat. No. 4,798,113) in view of the admitted prior art (APA) as applied to Claim 22 above, and further in view of Novak (U.S. Pat. No. 3,901,498). The claims on appeal are Claims 1, 10, 11, 14, 15 and 22-32, and they are reproduced in Appendix A.

REAL PARTY IN INTEREST

Black & Decker Inc. is the real party in interest, being the Assignee of the present application.

RELATED APPEALS AND INTERFERENCES

To the best of Applicants' knowledge, no other appeals or interferences are pending which will directly affect, directly affected by or have a bearing on the Board's decision in the present pending appeal.

STATUS OF CLAIMS

Claims 1, 10, 11, 14, 15 and 22-32 stand finally rejected. Claims 2-7, all dependent claims, are currently withdrawn from consideration at this time. Claims 8, 9, 12, 13 and 16-21 were cancelled. Claims 1, 10, 11, 14, 15 and 22-32 are on appeal.

STATUS OF AMENDMENTS

Applicants filed an amendment after final on December 17, 2003, amending Claims 27, 29, 30 and 32. In an Advisory Action mailed February 26, 2004, Paper No. 25, the Examiner indicated that this amendment will be entered for purposes of Appeal.

SUMMARY OF THE INVENTION

Referring to Figures 1-4 and to Figure 10, Claim 1 relates to a miter saw (10) having a base (12) and a table (13) rotatably attached to the base (12). A saw assembly (14-18) is pivotably connected to table (13) such that it can pivot from a first position perpendicular to the table (Figure 2) to a second position inclined in a first direction (Figure 6) or to a third position inclined in a second direction opposite to that shown in Figure 6. Referring to Figure 6, a first fence assembly (124, 126) on one side of the base (10) comprises a first fixed fence (126) and a first movable fence (124). A second fence assembly (124, 126) on the other side of the base (10) comprises a second fixed fence (126) and a second movable fence (124). The two fixed and movable fences allow for the positioning of the movable fences as close to saw blade (14) as possible when the saw blade (14) is in its upright position and when it is moved to one of its inclined positions. This feature of having a fixed and movable fence on both sides of saw blade (14) provides the maximum support for the work place regardless of the position of saw blade (14).

Referring to Figures 1-4, Claim 22 relates to a miter saw (10) having a base (12) a table (13) rotatably attached to the base (12). The table (13) defines a first workpiece supporting surface. A saw blade (14) is rotatably supported by base (12). A fence assembly (20) includes a first fixed fence (26) connected to the base (12) and a movable fence (24) connected to the base on the same side of the saw blade (14) as the first fixed fence (24). The first fixed fence (22)

defines a second workpiece supporting surface which extends a first distance from the first workpiece supporting surface. The movable fence (24) defines a third workpiece supporting surface which extends a second distance from the first fixed fence (26). The second distance is greater than the first distance. Thus, the workpiece supporting surface of the movable fence (24) is larger (taller) than the workpiece supporting surface of the fixed fence (26).

Claim 27 relates to the miter saw (10) as detailed above for Claim 1 but Claim 27 also adds the limitation that the first movable fence (124) is movable to a position between the first fixed fence (126) and the cutting tool (14).

Claim 29 relates to the miter saw (10) as detailed above for Claim 22 but Claim 29 also adds the limitation that the movable fence is movable to a position between the fixed fence (26) and the saw blade (14).

Claim 30 relates to the miter saw (10) as detailed above for Claim 1 but Claim 30 also adds the limitation that the movable fence (124) is movable to a position adjacent the cutting tool (14) when the cutting tool (14) is in the first position perpendicular to the table (13).

Claim 32 relates to the miter saw (10) as detailed above for Claim 22 but Claim 32 also adds the limitation that the movable fence (24) is movable to a position adjacent the saw blade (14).

ISSUE

Appellants present the following issue for review:

1. Whether or not independent Claims 1, 22, 27, 29, 30 and 32 are unpatentable under 35 U.S.C. § 103 over Viazanko (U.S. Pat. No. 4,798,113) in view of Applicants' admitted prior art. A copy of Viazanko is provided in Appendix B.

GROUPING OF CLAIMS

1. Claims 1, 10, 11, 14 and 15 stand or fall together.
2. Claims 22-26 stand or fall together.
3. Claims 27 and 28 stand or fall together.
4. Claim 29 stands alone.
5. Claims 30 and 31 stand or fall together.
6. Claim 32 stands alone.

ARGUMENT

The present invention relates to a miter saw which includes a base, a table attached to the base and a saw also attached to the base. Claims 1, 27 and 32 define a workpiece supporting structure which comprises a first fixed fence and a first movable fence located on one side of the saw and a second fixed fence and a second movable fence located on the other side of the saw. The first and second movable fences are movable to provide clearance for the saw when it is positioned vertically or when it is moved to a particular angle with respect to the table in order to make a bevel cut. By locating a movable fence on both sides of the saw, the maximum possible support for a workpiece can be provided because each fence can be moved adjacent the saw blade regardless of the miter or bevel position of the saw blade. As defined by Claims 1, 27 and 32, the first and second movable fences are movable to provide clearance for the cutting tool.

The Examiner states in his final rejection that Viazanko teaches or suggests almost every structural limitation of the claimed invention but it lacks the cutting tool being movable to second and third positions. (A bevel cut.) Applicants do not agree with the Examiner's interpretation of Viazanko. Viazanko does not disclose a fixed fence and a movable fence on both sides of the cutting tool. Viazanko discloses a two-piece fixed fence on each side of the

cutting tool and the pair of two-piece fixed fences are not movable to provide clearance for the cutting tool. The two-piece fixed fence of Viazanko is initially adjusted such that the scale will correctly show the dimension of the workpiece being cut. But once the initial adjustment is made, the fence remains in this position regardless of the position of the saw blade.

The fence disclosed in Figures 1 and 13 of Viazanko comprises a first fixed portion 22 (20), a second fixed portion 126 (162), a scale holder 144 (164, 165) and a scale 146. Figure 1 illustrates scale holder 144 extending to the end of first fixed portion 20 and Figure 13 illustrates scale holders 164 and 165 extending to the end of both first fixed portions 20 and 22. As stated in column 5, lines 43-54, when table 74 is aligned, groove 142 aligns with a similar groove in fence 22 and scale holder 144 is positioned therein. Scale holder 144 carries scale 146 and when zero on scale 146 is set to the side of the saw blade, scale 146 can be used to directly position wood to be cut. Thus, during the initial setup and/or adjustment for saw 10 in Viazanko, the position for scale holder 144 is set and then somehow locked to fixed rail 20, 22, 126 or 162. This allows for the simplified adjustment of stop 148 using window 158 and a witness line on window 158 to accurately set stop 148 using scale 146. There is nothing in Viazanko which suggests the continuous moving of scale holder 144 to adjust for movement of the saw blade. Clearly the Examiner has utilized hindsight reconstruction to find Applicants' invention in Viazanko.

In the case of In re Horn, 203 U.S.P.Q. 969 (C.C.P.A. 1979), Judge Watson clearly articulated the well-known standard under 35 U.S.C. Section 103. Judge Watson stated that "...there must be some basis for concluding that the reference would be considered by one skilled in the particular art working on the pertinent problem to which the invention pertains". 203 U.S.P.Q. at 971 (emphasis added).

The C.C.P.A. also addressed the required standards for Section 103 in the case of In re Meng and Driessen, 492 F. 2d 834, 181 U.S.P.Q. 94 (C.C.P.A. 1974). In the Meng case, Chief Judge Markey stated that although an invention may appear to be rendered obvious by a disclosure in the prior art reference, such a holding of obviousness is not proper when the disclosure occurs in a reference that is not directed toward the same problem as that addressed by the invention. Judge Markey further cautioned that the teachings or suggestions of such a reference must be evaluated without the use of hindsight gleaned from the applicant's disclosure, and thus must be viewed in a vacuum so far as the applicant's invention is concerned. 181 U.S.P.Q. at 97.

Applicants submit that the proper test for evaluating prior art under 35 U.S.C. Section 103 is whether or not the prior art can be seen as suggesting the Applicants' solution to the problem which the invention addresses. See: Rosemont, Inc. v. Beckman Instrument, Inc., 221 U.S.P.Q. 1, 7, (Fed. Cir. 1984). The scope of pertinent prior art has been defined as that reasonably pertinent to the particular problem with which the inventor was involved. See: Lindemann Machinefabrik GMBH v. American Hoist and Derrick Co., 221 U.S.P.Q. 481, 487, (Fed. Cir. 1984). Applicants assert that the use of hindsight in picking and choosing isolated elements and then applying these elements to the problems addressed by Applicants' invention is improper according to the above-discussed judicial standards governing the proper application of 35 U.S.C. Section 103.

The problems addressed by Applicants' invention is the provision of maximum support for a workpiece during all of the cutting positions for the saw blade. Viazanko has nothing to do with workpiece support, Viazanko is directed to the problem of accurately cutting a length of wood. The Examiner agrees that these inventions are directed towards different problems when in his response to our arguments he states "the fences in Viazanko are movable for at least the

reasons/benefits taught by Viazanko.” The movable scale holders of Viazanko solve the problem presented by Viazanko but do not solve the problem being addressed by Applicants’ invention.

If proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

“Although statements limiting the function or capability of a prior art device require fair consideration, simplicity of the prior art is rarely a characteristic that weighs against obviousness of a more complicated device with added function.” *In re Dance*, 160 F.3d 1339, 1344, 48 USPQ2d 1635, 1638 (Fed. Cir. 1998).

The intended use of scale holder 144 is to accurately and continuously measure wood using scale 146 once scale 146 and scale holder 144 are properly positioned during setup or adjustment of saw 10. The present invention provides movable fences which provide clearance for the cutting blade and maximum support for the workpiece at the various positions of the cutting blade and have nothing to do with measurement of a workpiece.

The intended use of scale holder 144 and scale 146 is to accurately and continuously cut wood to a specified length. If scale holder 144 and thus scale 146 was moved every time that the angle of the saw blade was changed, scale 146 and stop 148 would be useless for their intended purpose because the movement of scale 146 destroys the initial zero setting for the scale. Thus, using scale holder 144 and 146 as the movable fence of the present invention would render Viazanko unsatisfactory for its intended purpose.

Regarding Claim 27, the above argument with respect to Claim 1 applies here also. Claim 27 adds the limitation that the movable fence is movable to a position between the fixed fence and the cutting tool. Even though scale holder 144 is not a movable fence, nowhere in Viazanko does it disclose that scale holder 144 is positioned between the fixed fence 22 and the

cutting tool. The same can be said for scale holder 164 and fence 20; and scale holder 165 and fence 22. Viazanko only discloses that the scale holder 144, 164 and 165 is positioned even with the end of fence 22, 20 and 22 respectively and this position cannot be defined as between the fixed fence and the cutting tool. The Examiner states in his response to arguments that the scale holders of Viazanko are positionable such that they extend out from the fixed fence. Nowhere is this disclosed or even suggested by Viazanko. The Examiner is clearly using hindsight in modifying Viazanko to obtain the Applicants' invention.

Regarding Claim 30, the above argument with respect to Claim 1 applies here also. Claim 30 adds the limitation that the movable fence is movable to a position adjacent the cutting tool when the cutting tool is positioned perpendicular to the table (first position). Even though scale holders 144, 164 and 165 are not movable fences, no where in Viazanko does it disclose that these scale holders are positioned adjacent the cutting tool (saw 28). Regardless of the position of platform 124, there will always be a space between scale holders 144, 164 and 165 and saw blade 28 because nothing in Viazanko supports the movement of these scale holders beyond the inner end of fixed fences 20 and 22. The Examiner states in his response to arguments that the scale holders of Viazanko are positionable such that they extend out from the fixed fence. Nowhere is this disclosed or even suggested by Viazanko. The Examiner is clearly using hindsight in modifying Viazanko to obtain the Applicants' invention.

Regarding Claim 22, it defines a miter saw having an adjustable fence which has a fixed fence and a movable fence positioned on the same side of the saw blade. The height (second distance) of the movable fence is defined as being greater than the height (first distance) of the fixed fence. The height of the fixed fence (first distance) is defined from the table and the height of the movable fence (second distance) is defined from the fixed fence.

Even though Viazanko does not disclose a movable fence as discussed above, referring to Figure 2 of Viazanko, the height of the planar support surface for fixed fence 126 (and thus fixed fence 22 since fence 126 aligns with fence 22) is clearly greater than the height of the planar support surface for tool holder 144. This is exactly opposite to what is defined in Claim 22.

Regarding Claim 29, the above argument with respect to Claim 22 applies here also. Claim 29 adds the limitation that the movable fence is movable to a position between the fixed fence and the cutting tool. Even though scale holder 144 is not a movable fence, nowhere in Viazanko does it disclose that scale holder 144 is positioned between the fixed fence 22 and the cutting tool. The same can be said for scale holder 164 and fence 20; and scale holder 165 and fence 22. Viazanko only discloses that the scale holder 144, 164 and 165 is positioned even with the end of fence 22, 20 and 22 respectively and this position cannot be defined as between the fixed fence and the cutting tool. The Examiner states in his response to arguments that the scale holders of Viazanko are positionable such that they extend out from the fixed fence. Nowhere is this disclosed or even suggested by Viazanko. The Examiner is clearly using hindsight in modifying Viazanko to obtain the Applicants' invention.

Regarding Claim 32, the above argument with respect to Claim 22 applies here also. Claim 32 adds the limitation that the movable fence is movable to a position adjacent the cutting tool when the cutting tool is positioned perpendicular to the table (first position). Even though scale holders 144, 164 and 165 are not movable fences, nowhere in Viazanko does it disclose that these scale holders are positioned adjacent the cutting tool (saw 28). Regardless of the position of platform 124, there will always be a space between scale holders 144, 164 and 165 and saw blade 28 because nothing in Viazanko supports the movement of these scale holders beyond the inner end of fixed fences 20 and 22. The Examiner states in his response to arguments that the scale holders of Viazanko are positionable such that they extend out from the

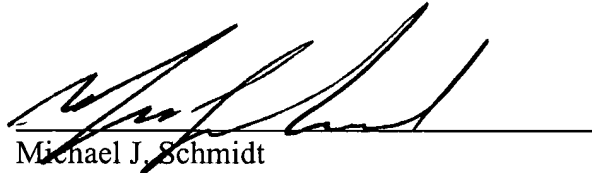
fixed fence. Nowhere is this disclosed or even suggested by Viazanko. The Examiner is clearly using hindsight in modifying Viazanko to obtain the Applicants' invention.

CONCLUSION

Based on the foregoing, Applicants/Appellants urge the Board to reverse the Examiner's final rejection of Claims 1, 10, 11, 14, 15 and 22-32 under 35 U.S.C. § 103. Furthermore, the Board should order the rejoinder and allowance of withdrawn Claims 2-7.

Respectfully requested,

HARNESS, DICKEY & PIERCE, P.L.C.



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Attachments: Appendix A – Claims on appeal
Appendix B – *Viazanko* (U.S. Pat. No. 4,798,113)

MJS/pmg

Appendix A

Claims 1, 10, 11, 14, 15 and 22-32 on appeal and withdrawn Claims 2-7 are as follows:

1. (on appeal) A miter saw comprising:

a base;

a table rotatably attached to the base;

a saw assembly pivotably connected to the table, said saw assembly comprising a rotatable cutting tool, a motor driving the cutting tool, and a housing covering the motor, the cutting tool being pivotably movable about a chopping axis in order to move the cutting tool towards the table for cutting a workpiece, the cutting tool being movable between a first position substantially perpendicular to the table, a second position inclined in a first direction from the first position to form a first acute angle with respect to the table, and a third position inclined in a second direction from the first position to form a second acute angle with respect to the table, the second direction being opposite to the first direction;

a first fence assembly disposed on one side of the base, the first fence assembly comprising a first fixed fence attached to the base, and a first movable fence being interconnected with the first fixed fence, the first movable fence being movable to provide clearance for said cutting tool when said cutting tool is in said second position; and

a second fence assembly disposed on the other side of the base, the second fence assembly comprising a second fixed fence attached to the base, and a second movable fence being interconnected with the second fixed fence the second movable fence being movable to provide clearance for said cutting tool when said cutting tool is in said third position.

2. (withdrawn) The miter saw of Claim 1, further comprising a handle connected to the housing, the handle being substantially horizontal.

3. (withdrawn) The miter saw of Claim 1, wherein the cutting tool defines a plane which intersects the motor.

4. (withdrawn) The miter saw of Claim 1, wherein the chopping axis is above the first fence assembly.

5. (withdrawn) The miter saw of Claim 1, wherein the saw assembly is movable along a vertical plane substantially perpendicular to the table.

6. (withdrawn) The miter saw of Claim 1, further comprising a rail supporting the saw assembly, and a housing pivotably connected to the table and supporting the rail.

7. (withdrawn) The miter saw of Claim 6, wherein the housing slidably supports the rail.

10. (on appeal) The miter saw of Claim 1, further comprising first anti-removal means for inhibiting removal of the first movable fence from the first fixed fence.

11. (on appeal) The miter saw of Claim 10, further comprising second anti-removal means for inhibiting removal of the second movable fence from the second fixed fence.

14. (on appeal) The miter saw of Claim 1, further comprising a first member attached to said first fixed fence for releasably holding the first movable fence in a predetermined position

in relation to the first movable fence in a predetermined position in relation to the first fixed fence.

15. (on appeal) The miter saw of Claim 14, further comprising a second member attached to said second fixed fence for releasably holding the second movable fence in a predetermined position in relation to the second fixed fence.

22. (on appeal) A compound miter saw comprising:

- a base;
- a table rotatably supported by said base, said table and said base defining a first planar workpiece-supporting surface;
- a saw blade rotatably supported by said base;
- an adjustable, laterally-extending, workpiece-supporting fence assembly, said fence assembly including a first fixed fence fixedly interconnected with the base and disposed on one side of the saw blade, and a movable fence selectively laterally movable and interconnected with the base and disposed on said one side of said saw blade, said first fixed fence defining a second planar workpiece-supporting surface which extends a first distance from said first planar workpiece-supporting surface and said movable fence defining a third planar workpiece-supporting surface which extends a second distance from said first fixed fence, said first fixed fence and said movable fence being located on said one side of said saw blade, said second distance being greater than said first distance.

23. (on appeal) A compound miter saw according to Claim 22, further comprising a second fixed fence fixedly interconnected with the base and disposed on an opposite side of the

saw blade, said second fixed fence further defining said second planar workpiece-supporting surface.

24. (on appeal) A compound miter saw according to Claim 23, wherein, said second fixed fence is integral with said first fixed fence.

25. (on appeal) A compound miter saw according to Claim 22, further comprising a fixed clamping means fixedly interconnected to said base for selectively and clampingly securing said movable fence to the base.

26. (on appeal) A compound miter saw according to Claim 22, further comprising a fixed clamping means fixedly interconnected to said base for selectively and clampingly securing said movable fence to the base, and a movable clamping means fixedly interconnected with said movable fence for selectively and clampingly securing said movable fence to the base.

27. (on appeal) A miter saw comprising:

- a base;
- a table rotatably attached to the base;
- a saw assembly pivotably connected to the table, said saw assembly comprising a rotatable cutting tool, a motor driving the cutting tool, and a housing covering the motor, the cutting tool being pivotably movable about a chopping axis in order to move the cutting tool towards the table for cutting a workpiece, the cutting tool being movable between a first position substantially perpendicular to the table, a second position inclined in a first direction from the first position to form a first acute angle with respect to the table, and a third position inclined in a

second direction from the first position to form a second acute angle with respect to the table, the second direction being opposite to the first direction;

a first fence assembly disposed on one side of the base, the first fence assembly comprising a first fixed fence attached to the base, and a first movable fence being interconnected with the first fixed fence, the first movable fence being movable to provide clearance for said cutting tool when said cutting tool is in said second position; and

a second fence assembly disposed on the other side of the base, the second fence assembly comprising a second fixed fence attached to the base, and a second movable fence being interconnected with the second fixed fence the second movable fence being movable to provide clearance for said cutting tool when said cutting tool is in said third position;

wherein said first moveable fence is moveable to a position between said first fixed fence and said cutting tool.

28. (on appeal) The miter saw of Claim 27 wherein said second moveable fence is moveable to a position between said second fixed fence and said cutting tool.

29. (on appeal) A compound miter saw comprising:

a base;

a table rotatably supported by said base, said table and said base defining a first planar workpiece-supporting surface;

a saw blade rotatably supported by said base;

an adjustable, laterally-extending, workpiece-supporting fence assembly, said fence assembly including a first fixed fence fixedly interconnected with the base and disposed on one side of the saw blade, and a movable fence selectively laterally movable and interconnected

with the base and disposed on said one side of said saw blade, said first fixed fence defining a second planar workpiece-supporting surface which extends a first distance from said first planar workpiece-supporting surface and said movable fence defining a third planar workpiece-supporting surface which extends a second distance from said first fixed fence, said first fixed fence and said movable fence being located on said one side of said saw blade, said second distance being greater than said first distance;

wherein said moveable fence is moveable to a position between said first fixed fence and said saw blade.

30. (on appeal) A miter saw comprising:

a base;

a table rotatably attached to the base;

a saw assembly pivotably connected to the table, said saw assembly comprising a rotatable cutting tool, a motor driving the cutting tool, and a housing covering the motor, the cutting tool being pivotably movable about a chopping axis in order to move the cutting tool towards the table for cutting a workpiece, the cutting tool being movable between a first position substantially perpendicular to the table, a second position inclined in a first direction from the first position to form a first acute angle with respect to the table, and a third position inclined in a second direction from the first position to form a second acute angle with respect to the table, the second direction being opposite to the first direction;

a first fence assembly disposed on one side of the base, the first fence assembly comprising a first fixed fence attached to the base, and a first movable fence being interconnected with the first fixed fence, the first movable fence being movable to provide clearance for said cutting tool when said cutting tool is in said second position; and

a second fence assembly disposed on the other side of the base, the second fence assembly comprising a second fixed fence attached to the base, and a second movable fence being interconnected with the second fixed fence the second movable fence being movable to provide clearance for said cutting tool when said cutting tool is in said third position;

wherein said first movable fence is movable to a position adjacent said cutting tool when said cutting tool is in said first position.

31. (on appeal) The miter saw of Claim 30, wherein said second movable fence is movable to a position adjacent said cutting tool when said cutting tool is in said first position.

32. (on appeal) A compound miter saw comprising:

- a base;
- a table rotatably supported by said base, said table and said base defining a first planar workpiece-supporting surface;
- a saw blade rotatably supported by said base;
- an adjustable, laterally-extending, workpiece-supporting fence assembly, said fence assembly including a first fixed fence fixedly interconnected with the base and disposed on one side of the saw blade, and a movable fence selectively laterally movable and interconnected with the base and disposed on said one side of said saw blade, said first fixed fence defining a second planar workpiece-supporting surface which extends a first distance from said first planar workpiece-supporting surface and said movable fence defining a third planar workpiece-supporting surface which extends a second distance from said first fixed fence, said first fixed fence and said movable fence being located on said one side of said saw blade, said second distance being greater than said first distance;

wherein said movable fence is movable to a position adjacent said saw blade.